IN THE MATTER OF ARBITRATION BETWEEN

ECOWATER SYSTEMS, INC.,	)	**ARBITRATION**
	)	**AWARD**
Employer,	)	
	)	
	)	
and	)	**DISCHARGE GRIEVANCES OF**
	)	**Allen Armstrong & James Scott**
	)	
	)	
TEAMSTERS LOCAL 120,	)	
	)	**FMCS Case Nos. 060309-54356-7**
Union.	)	**060309-54357-7**
	)	

Arbitrator:	Stephen F. Befort
Hearing Date:	October 27, 2006
Post-hearing briefs received:	December 23, 2006
Date of decision:	January 25, 2007
	APPEARANCES
For the Union:	Martin J. Costello
For the Employer:	Andrew S. Goldberg

INTRODUCTION

Teamsters Local 120 (Union) is the exclusive representative of a unit of production and maintenance workers employed by EcoWater, Inc. (Employer). The Union brings these two grievances claiming that the Employer violated the parties' collective bargaining agreement by discharging Allen Armstrong and James Scott without just cause. The Employer, on the other hand, maintains that it had just cause for discharge due to the grievants engaging in a workplace fight and other related violations

of valid company work rules. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer discharge the grievant for just cause? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 12
GRIEVANCE PROCEDURE

> Section 4. This section is intended to set up [a] special procedure for the prompt review and disposition of grievances involving the suspension or discharge of employees who have completed their probationary periods. When the Company believes that an employee's conduct may justify discharge or suspension, he/she shall be notified and suspended. The Company at the same time will give notice to the Union. Thereafter, the employee being disciplined can, if he/she so desires, consult with the Union representative before leaving the premises. The employee may request a hearing, which shall be granted within five (5) work days following his/her suspension. The employee will be accompanied by the Union business agent and/or steward.
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> At the hearing, the Company representative(s) shall state the offense and the facts concerning the case. Within three (3) work days following such hearing, the Company shall notify the employee and the Union of its intention to convert the suspension into a discharge or to affirm, modify, extend or revoke the original disciplinary action. Thereafter the employee may, if he/she so desires, appeal the Company's decision within three (3) work days to the grievance procedure. The grievances in such cases will be initiated at the third step of the grievance procedure.
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> **ARTICLE 13**
> **ARBITRATION**
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> If the grievance is not settled in Article 12, Section 1, Step 4 and the Company's final answer is not satisfactory to the Union, the Union may appeal the grievance to arbitration by giving written

notice of its desire to arbitrate to the Director of Manufacturing within ten (10) work days after the date of the Company's final answer in Step 4. … The arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this Agreement, and his/her decision and award shall be based solely upon his/her interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented. If the matter sought to be arbitrated does not involve an interpretation of the terms or provisions of this Agreement, the arbitrator shall so rule in his/her award and the matter shall not be further entertained by the arbitrator. The award of the arbitrator shall be final and binding on the Company, the Union and the employee or employees involved. The expenses of the arbitrator, including his/her fee, shall be shared equally by the Company and the Union.

* * *

ARTICLE 20
MANAGEMENT RIGHTS

Section 1. All rights of management not specifically limited or abridged by this Agreement, including the right to direct the working force; to hire, suspend, discharge and transfer; to lay off employees for lack of work or other legitimate reasons; and to establish and enforce plant rules not inconsistent with this Agreement are reserved to the Company; provided, however, that none of these rights will be exercised so as to violate the terms of this Agreement or to discriminate against any employee.

* * *

ARTICLE 21
COMPANY RULES

Section 1. Company rules will be simply written, issued over the signature of an authorized Company representative, and posted in a conspicuous place in each department. Any changes in Company rules or in Company policies which restrict or direct the hourly employees will also be in writing and posted in a conspicuous place in each department.

Section 2. Before the Company issues any new or changed Company rules, it will discuss them with the Union Committee. All Company rules must be consistent with the terms of this Agreement. If the Union objects to any new or changed Company rules, it shall have the right to challenge the reasonableness of such rule or its application through the grievance and arbitration procedure.

RELEVANT ECOWATER PLANT RULES

Below is a non-inclusive list of the EcoWater Plant Rules necessary for maintaining a harmonious and organized working environment. Each employee is responsible for knowing and understanding the Plant Rules of the EcoWater Company. Warnings or penalties received will remain active for a 12-month period and generally will not be considered in disciplinary action after that period. A total of five (5) offenses regardless of classification, if committed within a "rolling" 12-month period shall result in discharge.

	1st Offense	2nd Offense	3rd Offense	4th Offense
15. Using profane or abusive language directed towards a fellow employee or a member of management.	Suspension	Up to discharge		
23. Fighting, threatening, intimidating, or inciting a fight while on Company property; or any felonious attack (made with a weapon or in such a vicious manner as to indicate an intent to cause bodily injury or death) while on Company property	Up to discharge			
31. Deliberately establishing an unsafe work environment	Up to discharge			

FACTUAL BACKGROUND

The Employer manufactures water softeners at a facility in Woodbury, Minnesota. The grievants – Allen Armstrong and James Scott – have worked on the Employer's production line since the late 1990's. At the time of the incident in question, both grievants were assigned to the 2:45 p.m. to 10:45 p.m. shift in the Blow Mold Department. The blow mold machines make plastic casings for water softeners.

The Employer and Union are parties to a collective bargaining agreement. Article 20 of that agreement authorizes the Employer to establish and enforce plant rules not inconsistent with the agreement. Among the plant rules adopted by the Employer are: Rule 15 prohibiting the use of profane or abusive language directed at a fellow employee,

Rule 23 prohibiting fighting on company property, and Rule 31 which bars the deliberate creation of an unsafe work environment. It is undisputed that the Employer put the grievants on notice as to the contents of these work rules.

The incident giving rise to these grievances took place on January 31, 2006. On that day, Scott and two co-workers, Brian Rivett and Clara Logan-Ratcliff, were assigned to work on the number 5 blow mold line. Armstrong, meanwhile, was temporarily assigned to perform maintenance tasks.

At approximately 4:30 p.m., Armstrong entered the number 5 line area using an air hose to sweep debris on the floor. Scott and Rivett testified that Armstrong's actions caused dust, shavings, and other irritating particles to be blown in their direction. Both workers asked Armstrong to stop blowing the debris in their area. It is not clear whether Armstrong heard these requests, but in any event, he continued with his cleaning activities. Scott then disconnected the hose from the compressed air supply line. Armstrong, noticing that the line was no longer connected, plugged it back in to the compressor. Scott told Armstrong that the debris was blowing in their faces. Armstrong responded that he was sorry, but that he was just doing his job. Scott then disconnected the nozzle from the other end of the air hose, and Armstrong moved toward Scott to retrieve the nozzle.

At this point, there is some disagreement in testimony. Scott and Rivett testified that Armstrong pushed Scott as he attempted to retrieve the nozzle. Armstrong and Logan-Ratcliff, in contrast, testified that Scott first pushed Armstrong. All four of the witnesses testified that two or three reciprocal pushes ensued between Scott and

Armstrong over the course of a few seconds. Armstrong then left the area and reported the incident to a supervisor.

Later that same day, the Employer's Human Resources Director, Brenda Rivera, asked HR Representative Sasha Bindel to undertake an investigation of the incident. Bindel interviewed and took statements from each of the four employees present during the altercation. These statements depict a more violent encounter than that described at the hearing. Rivett's statement, for example, estimates that the shoving match went on for "no longer than three minutes." Rivett's statement also claims that one of Armstrong's shoves pushed Scott into the blow mold machine. Rivett's testimony at the hearing did not corroborate either of these contentions.

After the investigatory interviews, both Scott and Armstrong were sent home. Rick Topp, then an EcoWater supervisor, escorted Scott to the exit. According to Topp's testimony at the hearing, Scott told Topp as he was leaving that he would have killed Armstrong if he were twenty years younger.

The Employer suspended the grievants pending discharge. On February 3, the parties held a hearing under Article 12 of the parties' collective agreement at which representatives of the Employer and Union reviewed the facts underlying the disciplinary event. At this hearing, Armstrong alleged for the first time that Scott had thrown a punch and brandished a knife during the altercation. (Armstrong did not confirm these facts during his testimony at the hearing.)

Three days later, the Employer issued a termination letter informing the grievants that they were being discharged for violating Work Rules # 15 (profanity), 23 (fighting), and 31 (establishing an unsafe environment). The Employer's Director of

Manufacturing, David Kell, testified that the termination decision was based upon the serious nature of the incident which, at that time, appeared to entail a three-minute fight during which a knife was brandished, a punch was thrown, and a worker was pushed against operating machinery.

The Union timely grieved both terminations. The Scott grievance initially proceeded to an arbitration hearing on October 27, 2006 at which both grievants testified. Following the hearing, the parties stipulated that both grievances should be resolved based on the hearing record developed at the October 27 hearing.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to discharge the grievants. The Employer first asserts that the grievants' altercation on January 31, 2006 clearly violated valid work rules prohibiting fighting, profanity, and the establishment of an unsafe work environment. Rather than seeking supervisory assistance to resolve their dispute, each of the grievants took the law into their own hands by resorting to violent behavior. The Employer further argues that discharge is an appropriate sanction for this misconduct. The Employer claims that it has adopted a zero tolerance policy with respect to violence in the workplace. Consistent with this policy, the Employer introduced evidence showing that it discharged the instigator in the only other incident of fighting in the workplace over the past decade. In the present case, the grievants, building upon a past history of antagonism, engaged in a serious altercation posing a significant risk of injury. According to the Employer, such conduct warrants discharge, particularly since the Union has shown no basis to justify the mitigation of this outcome.

Union:

The Union does not dispute that the grievants engaged in conduct that violated the Employer's rule against fighting. Nonetheless, the Union contends that discharge is an excessive sanction under the circumstances for several reasons. First, the grievants are long-term employees without prior disciplinary problems. Second, the incident in question was only a minor scuffle, far less serious than what the Employer perceived when it made its termination decision. Finally, the Employer's resort to discharge in this instance is inconsistent with its past treatment of similar incidents.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its termination decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof to establish that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established by a preponderance of the evidence, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 948 (6th ed. 2003). Both of these issues are discussed below.

A. The Alleged Misconduct

Article 21 of the parties' collective bargaining agreement authorizes the Employer to adopt work rules that are not inconsistent with the parties' agreement. Pursuant to that grant of authority, the Employer has adopted a number of work rules prohibiting certain conduct, including the following three that are relevant to this dispute:

15. Using profane or abusive language directed towards a fellow employee or a member of management.

23. Fighting, threatening, intimidating, or inciting a fight while on Company property; or any felonious attack

31. Deliberately establishing an unsafe work environment

The Employer provided each of the grievants with a copy of these work rules and also posted them in the facility.

It is not disputed that the grievants violated work rules # 15 and 23. The record clearly establishes that the grievants engaged in a brief pushing match during which some profanity was uttered.

On the other hand, the Employer has not established a violation of rule 31. The allegation that the grievants deliberately established an unsafe environment apparently was based upon Rivett's investigatory statement in which he alleged that Armstrong pushed Scott into the blow mold machine during the altercation. At the hearing, no witness, including Rivett, corroborated this allegation.

In sum, the Employer has carried its burden of establishing that the grievants engaged in two forms of misconduct prohibited by valid work rules.

B. The Appropriate Remedy

While the grievants violation of these work rules certainly warrants a disciplinary response, the question remains as to whether the ultimate penalty of discharge or some lesser sanction is appropriate. The Employer contends that it has a zero tolerance policy with respect to fighting and that it has uniformly applied that policy in the past. Director Kell testified that the Employer has experienced only one other incident of fighting over the past decade, with the Employer terminating the instigator of that fight and imposing a

lengthy suspension on the other employee who fought only in self defense. The Employer acknowledged that discipline short of discharge may be appropriate for threats of violence or dangerous horseplay that does not entail actual fighting behavior.

The Union takes issue with these representations in two respects. First, the Union points out that the Employer's work rule does not mandate termination for fighting, but only warns that discipline "up to discharge" may be appropriate for such misconduct. Second, the Union submitted evidence of another fight in 2002 in which the employees were permitted to return to work under a last chance agreement. The Employer, however, maintains that this incident involved only horseplay rather than fighting.

Regardless of the existence of a zero tolerance policy, an Employer must nonetheless satisfy the traditional just cause criteria to justify a discharge decision. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 1010-12 (6th ed. 2003); *Kimberly-Clark Corp.*, 107 LA 554 (Byars, 1996). The Employer attempts to meet this burden by describing the January 31 altercation as a dangerous and protracted fight between two combatants with a long history of bad blood. Director Kell, for example, testified that the discharge decision was deemed appropriate at the time it was made because the incident appeared to entail a three-minute fight during which a knife was brandished, a punch was thrown, and a worker was pushed against operating machinery.

The evidence submitted at the hearing, however, does not support this version of events. The eyewitnesses to the event describe a few minor pushes that lasted only a few seconds. In Armstrong's words, it amounted only to "a little pushing match." Their description uniformly omits any reference to knives, punches, or workers making contact

with machinery. Furthermore, the testimony of Scott and Armstrong does not describe a running, angry feud, but only some annoyance about a one-time failure to return a borrowed piece of equipment.

The Employer argues that the investigatory accounts provided by Rivett and Armstrong, which described the incident in more serious terms, should be given more credence than the testimony at the hearing. The problem with this contention, over and above the lack of cross-examination, is that the initial statements of Rivett and Armstrong are uncorroborated in the rest of the record, including each other's respective statements. None of the other statements and none of the hearing testimony corroborated Rivett's initial statement allegation that Armstrong pushed Scott into operating machinery. Similarly, no one ever corroborated Armstrong's allegations about knives and punches at the Rule 12 hearing, and Armstrong did not confirm these allegations at the hearing. In the end, it is not clear whether the eyewitnesses maximized allegations during the investigation to deflect blame toward others, or minimized allegations at the hearing to avoid disciplinary consequences. What is clear is that the hearing record does not support the Employer's initial assessment as to the seriousness of the altercation under consideration.

Given these circumstances, I do not believe that the Employer has established a just cause basis for terminating two employees with good work records for an initial unintended and non-serious violation of its work rules. The sanction, instead, should be reduced to a lengthy period of suspension coupled with a stern warning concerning the likely consequences of any future rule violations.

AWARD

The grievances are sustained in part and denied in part. The Employer had just cause to discipline the grievants, but the sanction is reduced to a suspension of twenty (20) days without pay. The Employer is directed to reinstate the grievants and to make them whole for any resulting loss in pay and benefits less any compensation earned in mitigation. The Employer also is directed to correct the grievants' personnel files to reflect this determination. Jurisdiction is retained for a period of sixty (60) days from the date of this award to address any remedial issues as may be necessary.

Dated: January 25, 2007

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Stephen F. Befort
Arbitrator